PUBLIC PROSECUTOR

v.

ZAINUDDIN SULAIMAN & ORS.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CRIMINAL REFERENCE NO. 4 OF 1985]
2 DECEMBER 1985

CIVIL PROCEDURE: *Appeal - Section 66 of Courts of Judicature Act - Question of public interest - Interpretation of s. 173(c), (f) of Criminal Procedure Code.*

CRIMINAL LAW AND PROCEDURE: *Acquittal and discharge - Summary trial - Section 173(c), (f) of CPC - Before hearing evidence of the prosecution - Powers of Attorney - General.*

On 19 January 1984, the Magistrate at Seremban ordered an acquittal and discharge of the respondents without hearing any evidence of the prosecution. The Deputy Public Prosecutor applied to the High Court of Seremban for a revision of the decision but the application was turned down. The Deputy Public Prosecutor then applied under s. 66 of the Courts of Judicature Act and the Supreme Court granted him leave to have the following question of law of public interest determined:

> In view of Article 145(3) of the Federal Constitution and s. 173(c) and (f) of the Criminal Procedure Code, whether it is right in law for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution?

Held

[1] The Court has no power to acquit the accused before the end of the prosecution case. Whether the evidence has been given or not the phrase "all such evidence as may be produced" appearing in s. 173(c) of the Criminal Procedure Code (the Code) has the same meaning as the phrase "all the evidence hereinbefore referred to" in s. 173(f) of the Code. But the evidence meant by these two phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted. (The case of *PP v. Mohd. Said* [1984] 1 MLJ 50 was not followed.)

[2] Under s. 376 of the Code and Article 145(3) of the Constitution, the Attorney-General has the power to control and direct all criminal prosecutions and proceedings. Since the Attorney-General has this power exercisable at his discretion, it is not for the Court to say when the prosecution has to close its case or come to an end merely because it is unable to obtain a postponement in order to produce evidence which will prove the offence against the accused.

Cases referred to:
PP v. Mohd. Said [1948] 1 MLJ 50
Kuppusamy v. PP [1948] MLJ 25
PP v. Goh Kee Chuan [1967] 1 MLJ 174
Chu Chee Peng v. PP [1973] 2 MLJ 35

Legislation referred to:
Courts of Judicature Act 1964, s. 66
Criminal Procedure Code, ss. 173(c), (f), 376
Federal Constitution, art. 145(3)

JUDGMENT

Salleh Abas LP:

This is a criminal reference under s. 66 of the Courts of Judicature Act (Act 91) which arose from the decision of Magistrate, Seremban on 19 January 1984 ordering an acquittal and discharge of the respondents herein without hearing any evidence of the prosecution.

The learned Deputy Public Prosecutor applied to the High Court at Seremban for a revision of the decision but the application was turned down. Hence the order of the Magistrate stood.

Upon application by the learned Deputy Public Prosecutor, the Supreme Court granted him leave to have the following question of law of public interest determined:

> In view of Article 145(3) of the Federal Constitution and s. 173(c) and (f) of the Criminal Procedure Code, whether it is right in law for a Magistrate in a summary trial to acquit and discharge an accused person without hearing any evidence for the prosecution.

At our sitting on 2 December 1985 we answered the question in the negative and promised to give our written reason therefor. Hence this Judgment.

The record of this case shows that the case has been postponed no less than twelve times since the respondents were first charged on 9 January 1976 to the date when the Magistrate ordered acquittal in their favour on 19 January 1984, i.e. about eight years later. Of these twelve postponements, five were granted at the prosecution's request, two postponements because of the Court's own inability to hold the trial, whilst the remaining five postponements were granted at the behest of the defence.

The question which we have to answer here was whether a Magistrate holding a summary trial could acquit and discharge the accused without hearing the evidence for the prosecution at all.

Until the decision of Mohamed Azmi J (as he then was) in *PP v. Mohd. Said* [1948] 1 MLJ 50 it was generally considered as settled law that the Magistrate had no such powers. Murray-Aynsley J in *Kuppusamy v. PP* [1948] MLJ 25 held that the earliest stage at which a Magistrate can acquit an accused person is after hearing all the evidence for the prosecution. This ruling was accepted and followed by Ong Hock Sim J in *PP v. Goh Kee Chuan* [1967] 1 MLJ 174 and *PP v. Mahmud* [1974]. This view was also accepted by the Federal Court, whose judgment was delivered by Ong CJ in *Chu Chee Peng v. PP* [1973] 2 MLJ 35.

In *Chu Chee Peng's* case the Court was clearly of the view that a magistrate could not order an acquittal of the accused without hearing all the evidence which could be material to the prosecution case and that any discharge ordered by the magistrate without hearing such evidence could not amount to an acquittal and therefore could not be set up as a defence of *autrefois acquit* should the accused be subsequently recharged for the same offence. The Court in no uncertain terms said that there were two circumstances in which a magistrate could order an acquittal-

(1) when after all the evidence has been heard no case has been made out to support the charge, the acquittal is mandatory at the end of the prosecution (s. 173(f)).

(2) when because the main prop of the prosecution case has prematurely collapsed, and further proceeding would be an exercise in futility, the prosecution may in its discretion offer no further evidence (s. 254).

Any discharge of the accused other than in these two circumstances, such as a discharge because the charge is considered to be groundless, or because the application for postponement by the prosecution was turned down and the prosecution unable to proceed should only be a discharge not amounting to an acquittal.

However, this clear ruling was not followed by Mohamed Azmi J (as he then was) in *PP v. Mohd Said* (*supra*). The facts in that case were almost similar to those in the case under the present reference. In that case, because of the number of postponements and the inability of the prosecution to proceed due to the inavailability of two material witnesses, the accused was twice discharged by the Magistrate. The first discharge was ordered after the trial had commenced and evidence of six witnesses was heard, whilst the second discharge which was stated to be amounting to an acquittal was ordered before any evidence was heard, at all. The second discharge was the result of the Magistrate's refusal to allow the prosecution's application to postpone the trial. In other words, because of the inability of the prosecution to proceed with the trial, the Magistrate ordered the accused to be acquitted.

The prosecution conceded in *Mohd Said's* case that the decision of the Magistrate refusing the postponement asked for was a correct one but disputed that the Magistrate had the power to order a discharge amounting to an acquittal.

Mohamed Azmi J disagreed with the prosecution's submission and upheld the ruling by the learned Magistrate. In doing so he seemed to be preoccupied by a fear that if it were held that the Magistrate was incapable of ordering an acquittal following his refusal to allow a postponement the prosecution would have been able to continue charging the accused for the third time or indeed as many number of times as there would be discharges. He saw the situation as a judicial prosecution confrontation - a deadlock which should be avoided and solved. As a measure to thwart the prosecution's "abuse of power" of repetitive re-charging he thought that the Magistrate should have the power to deny the prosecution the right to re-charge the accused. He thus based his ratio upon a narrow construction of para. (c) of s. 173 of the Criminal Procedure Code (CPC). This paragraph says:

> If the accused refuses to plead or does not plead or claims to be tried, the Court shall proceed to hear the complainant (if any) and to take **"all such evidence as may be produced in support of the prosecution case."**
>
> (**emphasis supplied**)

He construed the underlined phrase to mean only "all such **available** evidence as may be produced in support of the prosecution **at the trial**" (again the underlining is ours), thereby excluding the evidence which is not so available, even though such evidence is material and needed by the prosecution to support its case and as such a postponement is sought for in order to make it available. The result is, according to the learned Judge's ruling that where material evidence (evidence in support of the prosecution) is not available at the trial the Court may, by refusing adjournment, treat the case of the prosecution as at an end and acquit the accused under paragraph (f) of s. 173 of the CPC.

We do not accept this narrow construction as it is plainly contrary to the wording of paragraph (f) which is as follows:

> If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

Under this paragraph an order of acquittal can be recorded only (1) when "all the evidence hereinbefore referred to" has been taken and (2) when the Court finds no case against the accused "has been made out which if unrebutted would warrant his conviction ....."

When does the Court make a finding as to whether a case against the accused is made out or not? Surely, at the close of the prosecution case. And what is the basis on which such a finding is made? The answer must be that the finding is made on the basis of "all the evidence hereinbefore referred to". Now what does this phrase mean? Whilst we accept the view of Mohamed Azmi J in that whatever this phrase means it must bear the same meaning as does the phrase "all such evidence as may be produced in support of the prosecution case" appearing in para. (c), we do not however agree that these two phrases only mean "such evidence as is available at the trial". In our view, these phrases also include evidence not available on the date of the trial as long as such evidence is material and needed to support the prosecution case.

Yet, if we accept the narrow construction in *Mohd Said's* case the Court can acquit the accused at any stage irrespective of whether it has heard some evidence or none at all. Both cases - partly heard and not yet heard cases - are in the same position in that they run the risk of being frustrated by the Court refusing an adjournment, necessitating the making of an order of acquittal if the evidence needed to support the prosecution case is not available on the day of the trial. This is plainly contrary to the decision in *Kuppusamy's* case.

In our view the Court has no such power before the end of the prosecution case, whether the evidence has been given or not. The phrase "all such evidence as may be produced" appearing in paragraph (c) of s. 173 of the CPC of course has the same meaning as the phrase "all the evidence hereinbefore referred to" appearing in paragraph (f). But the evidence meant by these two phrases include both the evidence which is available at the trial and that which is not but will be made available if a postponement of the trial is granted.

This narrow ruling means that the Court takes upon itself the power of deciding when the prosecution should end its case. Such consideration is not only not justified by the wordings of those two paragraphs but also clearly contrary to the provision of s. 376 of the CPC and Article 145(3) of the Constitution. Section 376 empowers the Attorney-General who is also the Public Prosecutor to control and give direction over and in respect of all criminal prosecutions and proceedings, whilst Article 145(3) declares that "the Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, ..."

Since the Attorney-General has this power exercisable at his discretion, it is not for the Court to say when the prosecution has to close its case or has to come to an end merely because it is unable to obtain a postponement in order to produce evidence which will prove the offence against the accused, and thus acquit him on the basis of no evidence or on the basis of the evidence thus far produced without waiting for the evidence for which postponement is sought, citing as an authority a burden of proof principle that it is for the prosecution to prove the guilt of the accused. Of course, the prosecution has the duty to do so, but the Court has no power to stop the prosecution from performing its duty by

acquitting without hearing evidence. Moreover this burden of proof principle will be applicable only when the prosecution has called all the evidence which it wishes to produce in support of its case, including the evidence which is not capable of being produced at the trial without the necessity of a postponement.

Of course, postponements whether they be refused or granted are always at the discretion of the Court. Should it refuse a postponement, the dead lock which Mohamed Azmi J had spoken about is not without solution. It could be solved by continuous mutual respect and co-operation between the Court, the prosecution and the defence. In ordering a discharge the Court should not be unduly concerned about the possibility of subsequent re-arrest and re-charging. There is every possibility (one always hopes for the best) that the prosecution may wish to discontinue the proceeding as frequent re-arresting and re-charging would reflect badly on the conduct of the prosecution. In that event it may withdraw the charge or simply offer no evidence, or even enter a *nolle prosequi*. If, however, the prosecution is not prepared to discontinue the proceeding, as it might have a reason of public interest to continue and maintain it, there are only two options open to the Court - grant the postponement sought for or discharge the accused. If the Court considers that a mere discharge does not meet with the justice of the case because the offence by reason of numerous postponements has become trivial and lost its potency and that the case should be disposed of quickly the Court should make an order leaving the prosecution with no choice except to discontinue. Perhaps, a short adjournment or a last adjournment should be granted so as to enable the prosecution to makeup its mind one way or the other. It might well be that in the end the prosecution may decide to discontinue. Thus, the co-operation and mutual respect between the bench and the bar in the administration of justice is so important that it should not be undermined.

A word of caution should be expressed here. Magistrates must appreciate that the refusal to postpone trials must inevitably result in the discharge of the accused and this power should therefore be used sparingly as a last resort only. It should not be ordered as an expression of anger and exasperation at or as a censure against the conduct of the prosecution. Failure to exercise this power judicially will lead to injustice and inconvenience to the accused - the very purpose for which power is exercisable. It is therefore necessary to consider the possibility of re-charge and weigh it with the convenience or otherwise which would be caused to the accused. There is no advantage to him if his discharge will result in his subsequent re-arrest, because by then his solicitor or Counsel would have been discharged following his discharge by the Court and therefore his solicitor or Counsel has to be re-engaged, thus entailing additional expenses. The Court's record no doubt would appear to be neat and tidy by the order of discharge but it does not solve the problem of the accused's liability and possibility of disadvantage and inconvenience that would be caused to him.

Anyone performing a judicial function naturally abhors at the idea of the prosecution re-charging a person who has just been discharged and released by the Court. The possibility of conflict between the Court and the prosecution as reflected in repetitive discharges and subsequent re-charges should not be solved by ascribing to the Court the power which it has not or by giving it an upper hand so that it could stop and prevail over the prosecution in such conflict by ordering a discharge amounting to acquittal.

The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review. If he is a Minister of the

Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the Government will answer for him in Parliament, whilst he himself will be answerable to the Government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission, though anomalously he is a member of it. Members of the public expect that he exercises his power *bona fide* and professionally in that when he prefers a charge against an individual he does so because public interest demands that prosecution should be initiated and when he refrains from charging an individual or discontinues a prosecution already initiated he also acts upon the dictate of public interest.

In view of what we have said above, our answer to the question raised in this reference is that in a summary trial, para. (c) and (f) of s. 173 of the CPC do not empower the Court to order a discharge amounting to an acquittal of an accused person without hearing evidence of the prosecution in support of its case.

Also found at [1986] 1 CLJ 468